(22,406)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 170.

CHARLES DUMMER BARRY, FREDERICK WALKER LINCOLN, AND JOHN RICE BRADLEE, SURVIVING PARTNERS OF HENRY W. PEABODY & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1912.

1 In the Court of Claims.

No. 30032.

HENRY WAYLAND PEABODY, CHARLES DUMMER BARRY, FREDERICK WALKER LINCOLN and JOHN RICE BRADLEE, Composing the Firm of Henry W. Peabody & Co.,

v.

THE UNITED STATES.

I. *Petition.*

[Filed July 18, 1907.]

To the Honorable the Court of Claims of the United States:

The claimants above named, comprising the firm of Henry W. Peabody and Company, respectfully represent:

1. The claimants are a partnership, having their principal office and place of business at the City of New York, but with a number of branches, particularly at Manila, Philippine Islands, and at Sydney, New South Wales, Australia.

2. On the first day of July, in the year 1904, the claimants entered into a contract with the United States, represented by Col. Jno. L. Clem, Asst. Quartermaster-General, United States Army, Chief Quartermaster of the Philippines Division, to furnish and deliver for the use of the Quartermaster's Department, United States Army,

2 during the fiscal year ending June 30, 1905, 70,000 tons of 2,240 lbs. each of coal known as Wallsend, of good quality, for steaming purposes, screened and picked twice, free from dust, shale or slag, at a rate not to exceed 8,000 tons per month, a copy of which contract is annexed to this petition and made a part thereof.

3. By said contract it was provided that deliveries thereunder should commence on the 15th day of August, 1904, and deliveries were so commenced; but at the request and for the convenience of the United States the full delivery of 8,000 tons per month was not made although the claimants were ready and willing to make such deliveries, but refrained from so doing at the request of the officers of the United States and at inconvenience and loss to the claimants; so that prior to the 1st day of January, 1905, only 25,836 tons had been delivered instead of approximately 40,000 tons which would have been the amount to be delivered by that time if the claimants had insisted upon delivering the full amount called for by the contract.

4. During the month of January, 1905, there was a strike at the collieries at Newcastle, N. S. W., from which the supplies of Wallsend coal were necessarily drawn, so that it was for a short time impossible to furnish that particular kind of coal. The claimants informed the officers of the Quartermaster's Department at Manila

of this fact and having a steamer ready to load, offered them for immediate shipment, if desired, a cargo of the best coal obtainable other than Wallsend coal, known as "Mountain" coal and which coal, though not in all respects equal to Wallsend coal and known to the officers of the United States not to be in all respects equal, was an excellent coal well suited for steaming purposes, the purpose specified in the contract, and in all other respects complying with the terms of the contract. On the 21st day of January, the
3 Chief Quartermaster of the Philippines Division, by oral agreement, accepted this cargo at the price of five dollars and fifteen cents ($5.15) per ton, the same price as that stipulated in the contract for Wallsend coal, agreeing that the same should be regarded as an open-market purchase at that price, which price was not above the market price of such coal, especially for a single cargo thereof. The representative of the claimants at Manila at once cabled to the representative of the claimants at Sydney, N. S. W., Australia, to load and forward this cargo, which was done with all reasonable dispatch, and the steamer sailed from Sydney on the 2d day of February, 1905, with 6,000 tons of said Mountain coal.

5. On the 3d day of February, in the year 1905, the representative of the claimants at Manila wrote the Chief Quartermaster, stating the oral agreement and understanding as follows:

"In accordance with our conversation with you relative to our supplying your department with a cargo of about 6,000 tons of Mountain coal (Australian) to arrive the latter part of this month per SS. 'Indradeo,' we have the honor to ask you to furnish us with necessary order for same as an outside purchase, understanding that you do not wish to receive this cargo as applying on our present contract with you, dated July 1, 1904. The price for this cargo, as arranged, is $5.15 U. S. currency, per ton of 2,240 lbs. ex ship Manila Bay, subject to free entry."

This request was finally returned with various endorsements, one of which specifying that a sample of the Mountain coal would be shipped to the Quartermaster-General for test and in case it fell below Wallsend the difference would be charged against the contractors. No such stipulation was made at the time the officers of the government verbally accepted this cargo and authorized
4 the claimants to cable for its shipment. The representative of the claimants in Manila at once protested against the insertion of any such clause in the agreement and the claimants have never agreed to it.

6. Said cargo of Mountain coal arrived at Manila and was delivered to the officers of the Quartermaster's Department on the 20th day of February, 1905. Thereupon the Chief Quartermaster prepared a voucher in favor of the claimants for the coal so brought and delivered at the price of five dollars and fifteen cents ($5.15) per ton, and paid the same in full, without deduction, to the representative of the claimants at Manila. It was then forwarded to Washington where samples of coal taken from said cargo were compared with samples of Wallsend coal and it was alleged that such Mountain coal fell below the Wallsend coal in quality to an extent

requiring a deduction for proportionate inferiority to the amount of three thousand one hundred and ninety-three dollars and thirty-six cents ($3,193.36), and that amount was charged against the claimants and deducted, against their protest, from payment made to them on another contract for coal for the subsequent fiscal year, all payments under the contract for the year ending June 30, 1905, having by that time been closed.

7. The claimants applied to the Quartermaster-General and afterwards to the Secretary of War for payment of the amount so deducted, but those officers refused to remove said deduction, or make payment of the amount so deducted. They then applied to the Comptroller of the Treasury who likewise refused to authorize the repayment to them of such deduction, and it has never been repaid. No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

5 8. All the claimants are citizens of the United States. The amount herein claimed is justly due the claimants, after deducting all just credits and offsets, and the claimants believe the facts as stated in this petition to be true. The claimants ask judgment for three thousand one hundred and ninety-three dollars and thirty-six cents ($3,193.36).

HENRY W. PEABODY & CO.,
Claimants.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimants.

STATE OF NEW YORK,
County of New York, ss:

John Rice Bradlee, being duly sworn deposes and says: I am one of the claimants in this case. I have read the above petition, and the statements therein made are true, to the best of my knowledge and belief.

JOHN RICE BRADLEE.

Subscribed and sworn to before me this sixteenth day of July, nineteen hundred and seven.

[SEAL.] HENRY REMSEN RITCH,
Notary Public.

6 II. *General Traverse.*

Filed May 19, 1910.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

7 III. *Argument and Submission.*

This case was argued by Mr. George A. King for the claimants, and by Mr. William F. Norris for the defendants, on the 19th and 25th days of May, 1910, and was submitted.

8 IV. *Findings of Fact and Conclusion of Law.*

Filed October 24, 1910.

Findings of Fact.

I.

The claimants, as partners, under the firm name and style of Henry W. Peabody & Co., did, on the 1st day of July, 1904, enter into the following contract for the supply of coal for the use of the Quartermaster's Department, United States Army, during the fiscal year ending June 30, 1905:

This agreement, entered into this first day of July, nineteen hundred and four, between John L. Clem, colonel and assistant quartermaster-general, United States Army, of the first part, and Henry Wayland Peabody, Charles Dummer Barry, Frederick Walker Lincoln, and John Rice Bradlee, comprising the firm of Henry W. Peabody & Co., of New York, in the county of New York, State of New York, of the second part, witnesseth, that the said Jno. L. Clem, colonel and assistant quartermaster-general, United States Army, for and in behalf of the United States of America, and the said Henry W. Peabody & Co. do covenant and agree to and with each other as follows:

I. That the said parties of the second part shall furnish and deliver for the use of the Quartermaster's Department, United States Army, during the fiscal year commencing on the first day of July, nineteen hundred and four, and ending on the thirtieth day of June, nineteen hundred and five, seventy thousand (70,000) tons, of two thousand two hundred and forty (2,240) pounds each, of coal, known as "Wallsend," of good quality for steaming purposes, screened and picked twice, free from dust, shale, or slag, as follows:

II. That deliveries shall be made ex ship, Manila Bay, at a rate not to exceed eight thousand (8,000) tons per month: Pro-
9 vided, That the said parties of the second part shall make deliveries on this contract at Iloilo, Cebu, Camp Overton, Jolo, or Zamboanga, P. I., in such quantities, not to exceed eight thousand (8,000) tons per month, and at such times as may be required by the United States, and provided further, that the United States shall give the said parties of the second part forty-two (42) days' written notice, when requiring deliveries at ports outside of Manila Bay.

III. That deliveries to be made in Manila Bay shall be in two (2) shiploads, one of which shall arrive between the first day and the fifteenth day of each calendar month, and the other between the fif-

teenth day and the last day of each calendar month, but in no case shall two shiploads of coal be in Manila Bay, discharging under this contract, at the same time: Provided, That should said two (2) ships be discharging at the same time the United States shall not be liable for demurrage.

IV. That all deliveries on this contract shall be subject to careful inspection, under instructions of the chief quartermaster, Philippines Division, United States Army, and the quantity delivered shall be determined by weight.

V. That the United States shall discharge vessels at the rate of three hundred and fifty (350) tons per day in Manila Bay, and at the rate of three hundred (300) tons per day at Iloilo, Cebu, Camp Overton, Jolo, and Zamboanga, P. I., for weather-working days, exclusive of Sundays, holidays, and feast days, said discharging to commence not later than twelve (12) hours, ex steamer, or (24) hours ex sailing vessel, after notice, in writing, of arrival in port; and for failure on the part of the United States to discharge vessels as herein provided, the United States shall be liable for and pay demurrage at the rate of one hundred and seventy-five (175) dollars per day, U. S. currency: Provided, That in the event that quarantine shall be established at any port, where it may be necessary under this contract for any vessel to touch, hostilities, blockades, fire, act of God, public enemies, piracy, or restraint of rulers or princes, causing delay in movement or discharge of vessel thereby, then neither party to this contract shall be held responsible for such delay: Provided further, That in case the United States shall fail to discharge three hundred (300) tons per day at outposts, and shall make up for any such shortage by discharging a correspondingly larger amount at Manila than the amount specified, three hundred and fifty (350) tons per day, then the United States shall not be liable for demurrage caused by failure to discharge stipulated amount at said outports.

VI. That the said parties of the second part shall file with the officer in charge of water transportation an official report of tests, showing the quality of the coal intended to be delivered and a sufficient sample for test, and if at any time the coal offered under this contract shall fall below the report so filed or the quality of the sample submitted, then such coal will be rejected.

VII. That the United States reserves the right to increase or diminish the amount of coal called for under this contract, twenty (20) per cent, upon written notice to the said parties of the second part of such intention; said notice to be given by the chief quartermaster, Philippines Division, or by the officer in charge of water transportation, under said chief quartermaster's authority.

VIII. That the United States shall furnish the said parties of the second part with free entry, under section 385, customs tariff, for all coal delivered under this contract.

IX. That payment for coal delivered under this contract shall be made as early as practicable after the discharge of each and every vessel at Manila or outports.

X. That deliveries on this contract shall, if required, commence

on the fifteenth day of August, nineteen hundred and four, provided that the agreement is approved by the proper authorities of the War Department; otherwise, not until such approval is obtained.

XI. That for and in consideration of the faithful performance of the stipulations of this agreement, the party of the second part shall be paid, at the office of the officer in charge of water transportation at Manila, P. I., as follows: For each and every ton of coal furnished and delivered at Manila, Iloilo, Cebu, Camp Overton, Jolo, and Zamboanga, P. I., subject to all the provisions of this contract, the sum of five (5) dollars and fifteen (15) cents per ton, U. S. currency.

XII. That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof then the party of the first part shall have the power to purchase in open market at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, the difference in cost to be charged to and paid by the said parties of the second part, or their sureties.

XIII. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said Henry W. Peabody & Co. are reserved to the United States.

IX. No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.[a]

This contract shall be subject to approval of the commanding general, Philippine Division, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

(Sgd.) J. O. TEETER, as to
(Sgd.) JNO. L. CLEM,
Colonel and Asst. Quartermaster-General, U. S. Army.
(Sgd.) ROBERT LEE STRAYER, as to
(Sgd.) HENRY W. PEABODY & CO.,
By GEORGE NICHOLS LAMB,
Attorney.

(Executed in quintuplicate.)

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[a] Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract."—See sec. 3740, Revised Statutes.

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or
11 a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal.

This contract need not be executed under seal.

Insertion of words "of equal grade" in 5th line of Article XII made after signing.

(Sgd.) E. H. GRIFFITH, as to
(Sgd.) JNO. L. CLEM,
Col., Asst. Q. M. G., U. S. A.

(Sgd.) R. L. STRAYER, as to
(Sgd.) HENRY W. PEABODY & CO.,
(Sgd.) By GEORGE NICHOLS LAMB,
Attorney.

HEADQUARTERS PHILIPPINE DIVISION,
MANILA, *July* 9, 1904.

Approved:
By command of Major-General Wade:
(Sgd.) W. J. GLASGOW,
Captain, 13th Cavalry, A. D. C.,
Act'g Ass't Adj't General.

[*Indorsements.*]

Articles of agreement between Jno. L. Clem, Asst. Quartermaster, U. S. A., at Manila, P. I., and Henry W. Peabody & Co. For 70,000 tons of coal at Manila, P. I. Dated July 1, 1904. Expires June 30, 1905. Bond, $5,000. Sureties: Fidelity Dep. Co. of Maryland, American Surety Co. of N. Y.

Headquarters Philippine Division, July 6, 1904.

II.

Deliveries were begun under this contract in August, 1904, and averaged about one delivery a month, and were made at the times and places and to the amounts requested by the officers of the Quartermaster's Department, who did not require or wish the full amount specified in the contract to be delivered and who also did not give and were not required to give the amount of notice specified in paragraph 2 of the contract for deliveries at ports outside of Manila Bay.

In the month of January, 1905, a strike took place at the Newcastle collieries in Australia, the source of supply of the coal known as Wallsend, specified in the contract, whereby the claimants became temporarily unable to supply that kind of coal. Being informed of this fact by cablegram dated January 21, 1905, and received at Manila on the same day, the agent of the claimants conveyed immediate notice thereof to Col. John L. Clem, Assistant Quartermaster-General, United States Army, chief quartermaster of the Division of the Philippines at Manila, informing him at the same time that,

as also stated in the same cablegram, an equal quantity of good Australian coal, known as mountain coal, could be supplied. It was stated in the conversation with Colonel Clem that this mountain coal was not fully equal to Wallsend, but that it was believed to be a good coal. Colonel Clem agreed to accept said mountain coal. It was then and there stated between said agent of the claimants and said Colonel Clem that the price to be paid for the 6,000 tons of mountain coal then required by the Government should be $5.15 a ton, the same price as specified in the contract for Wallsend coal, and agreed that the same should be considered as a purchase outside of the contract to meet existing conditions. The agent of the claimants thereupon cabled to their office at Sydney, New South Wales, Australia, ordering the 6,000 tons of mountain coal, and the same was delivered by the claimants, accepted by the Government, and paid for on a voucher of the disbursing quartermaster at Manila at the rate of $5.15 a ton.

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III.

On the 3d of February, 1905, after the shipment, but before the delivery of said mountain coal, the claimants addressed a letter to Colonel Clem asking to be furnished with an order for said coal as a purchase in accordance with the agreement and conversation referred to in the preceding finding. Colonel Clem thereupon informed the claimants, through the officer in charge of water transportation, that a sample of the mountain coal would be shipped to the Quartermaster-General for test, and in case of its falling below the Wallsend coal, that difference would be charged against the claimants under the contract. The claimants, by letter of February 18, 1905, protested against this qualification, insisting that the agreement orally made with Colonel Clem was to accept mountain coal at the same price as that specified in the contract for Wallsend coal without reserve as to quality. The mountain coal was inferior to Wallsend coal, but its market value at Manila at that time, owing in part to said strike, was $5.15 a ton, the price orally agreed upon and paid to the claimants.

IV.

A sample taken from the cargo of mountain coal above mentioned was sent to the Quartermaster-General at Washington, and on being subjected to test was found to be of less value than the Wallsend coal, as provided by the contract, the pro rata reduction in price of the cargo being found to be $3,193.32, or of the value of $4.63 a ton instead of $5.15.

Thereafter claimant entered into a second contract with the chief quartermaster of the Division of the Philippines to deliver 60,000 tons of West Wallsend coal for the fiscal year beginning July 1, 1905. In the month of April, 1906, the quartermaster deducted from the price of a cargo of coal delivered under said contract the sum of $3,193.32 due the United States, the difference in value between the Wallsend coal as provided by the contract and the mountain coal delivered by the claimant.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are not entitled to recover, and their petition is dismissed.

BY THE COURT.

13 V. *Opinion.*

PEELE, *Ch. J.*, delivered the opinion of the court:

The claimants, by the terms of the contract set forth in the findings, agreed to furnish and deliver to the Quartermaster's Department, United States Army, Philippine Islands, for the fiscal year ending June 30, 1905, 70,000 tons of Wallsend coal, from Australia in deliveries ex ship Manila Bay, at the rate of 8,000 tons per month, and at certain other places in said islands mentioned in the contract upon the giving of the notice therein required, all at the price of $5.15 per ton.

The claimants commenced delivery in August, 1904, and delivered to the satisfaction of the officers of the Government until January, 1905, when, by reason of a strike in the Newcastle collieries, in Australia, the claimants were unable to supply said Wallsend coal. The chief quartermaster of the division of the Philippine Islands, with whom the contract on behalf of the Government was made, was informed of the strike and of the claimant's inability to deliver Wallsend coal by reason thereof. The claimants at the same time offered to furnish the Government an equal quantity of good Australian coal known as mountain coal, though inferior to the Wallsend coal, at the same price, and said quartermaster agreed to accept 6,000 tons thereof at $5.15 per ton, the purchase to be considered outside the contract to meet existing conditions.

Thereupon a cable message was sent by the agent of the claimants to their office in Sydney, New South Wales, Australia, directing the shipment of said quantity of mountain coal. After shipment but before delivery had been made the quartermaster, upon the request of the claimants to be furnished with an order for said coal in accordance with the verbal agreement so made, informed the claimants that a sample of said mountain coal would be shipped to the Quartermaster-General for test, and in case it fell below the Wallsend coal the difference would be charged against the claimants under their contract, to which the claimants in writing protested as not in accordance with their verbal agreement.

Though the mountain coal was inferior to the Wallsend coal, it was reasonably worth at Manila at the time, owing in part to said strike, $5.15 per ton. A sample of said mountain coal was sent to the Quartermaster-General at Washington, but in the meantime the coal so ordered and delivered was accepted and paid for. Thereafter the coal so sent was tested and found to be of the value of $4.63 per ton as compared with Wallsend coal, or $3,193.32 less than for the same tonnage of Wallsend coal.

The claimants thereafter entered into a second contract with said chief quartermaster to deliver 60,000 tons of West Wallsend coal for the fiscal year ending June 30, 1906, and in April following there was deducted from the amount then due the claimants for coal so delivered under said second contract the sum of $3,193.32, for the recovery of which the claimants now bring this action.

The claimants' contention is that whether the purchase be regarded as a delivery under the contract or as an open market purchase, they are entitled to recover because of the verbal agreement and the acceptance of the coal and payment therefor at the price agreed upon; that thereby the transaction was settled and
14 consummated, and thereafter the Government had no right to reopen the transaction and deduct the amount it did under the second contract without the claimants' consent.

The claimants treat the purchase of the mountain coal as a slight departure from the written contract and as within the authority of the officer in charge of its execution. There is much force in the argument that though the contract may not have conformed to the requirements of the law, still, since the coal was accepted and paid for at the rate agreed upon, the transaction was closed, and in support of this contention the claimants cite a number of authorities, but owing to the prior contractual relations between the parties concerning the same subject-matter we are unable to agree with counsel that the authorities cited by him apply in the present case. Here there was no conflict in the provisions of the contract requiring modification, nor did the quartermaster in charge require the claimants to do or perform any act outside the terms of the contract, nor was it in any way the fault of the United States or any of its officers that the claimants were unable to perform their contract in delivering Wallsend coal. They had obligated themselves to deliver Wallsend coal in certain quantities, and their inability to do so was the result of a strike in the collieries in Australia from which said coal came. There is no provision in the contract, however, which exempts or excuses the claimants from the performance of their contract by reason of a strike. They were equally bound to deliver the coal contracted for after as well as before the strike and when, for their accommodation and convenience, the quartermaster agreed to accept a different and inferior quality of coal at the contract rate, though nothing was said at the time about a sample being sent to the Quartermaster-General for test, still the oral contract, if contract it was, must be construed with reference to the terms of the written contract, Article XII of which provides:

"XII. That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to purchase in open market at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, the difference in cost to be charged to and paid by the said parties of the second part, or their sureties."

Under paragraph 4 of the contract all deliveries were to be sub-

ject to a careful inspection, while under paragraph 6 the claimants were required to file with the officer in charge of water transportation an official report of test showing quality of coal intended to be delivered together with a sufficient sample for test, and if the coal offered for delivery fell below said report or the quality of the sample so submitted, same was to be rejected.

In view of the provisions of the contract and the legal limitations upon the quartermaster as the agent of the Government, of which the claimants were bound to take notice, we can not accept the oral agreement as modifying the written contract or definitely fixing the price of the mountain coal when it was at the time known to both parties to be inferior to the Wallsend coal. On the contrary the oral agreement, whether the mountain coal was to be accepted under the contract or as an outside purchase, was subject to the pro-
15 visions of the contract between the same parties. The amount of the deduction was ascertained as provided by the contract and, under the law, was a proper subject of set-off against any claim in favor of the claimant.

True, there is no fraud or bad faith charged in this case, but if the officers or agents of the Government can excuse a contractor from the performance of his contract by accepting an inferior quality of coal or other supplies than that contracted for and, too, at the contract rate, then contractors who may have underbid to secure a contract might thereby gain an advantage over other bidders to the detriment of the Government, especially where performance is prevented by some cause not covered by the contract. The question of hardship not provided against in the performance of a contract is not a question to be considered by the officer or agent, who has no authority to relieve therefrom or to compensate one on account of losses suffered by him in the fulfillment of his contract. He is the agent of the Government to see that the contract is carried out, and has no authority to vary the same to meet conditions not therein provided against.

Without considering the case further we think the opinion of the Judge-Advocate-General, as well as the opinion of the Comptroller, in rejecting the claim was correct, and the petition must, therefore, be dismissed, which is accordingly ordered.

16 VI. *Final Judgment.*

At a Court of Claims held in the City of Washington, D. C., on the 24th day of October, 1910, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree that the petition of the said Henry Wayland Peabody, Charles Dummer Barry, Frederick Walker Lincoln and John Rice Bradlee, comprising the firm of Henry W. Peabody & Co., be, and the same is hereby, dismissed.

BY THE COURT.

17 VII. *Suggestion of Death and Motion for Re-entry of Judgment.*

Now come King & King, attorneys of record for the claimants in this cause, and suggest to the court that prior to the entry of the judgment in this case, Henry Wayland Peabody, one of the claimants, departed this life, of which fact the attorneys of record were not aware until after the judgment was entered. They, therefore, suggest that, as it is the desire of the surviving partners to appeal from this judgment, the judgment entered on the 24th day of October, 1910, be set aside and this suggestion of death entered as of record and the judgment be re-entered nunc pro tunc as of October 24, 1910, in the name of the surviving partners, Charles Dummer Barry, Frederick Walker Lincoln and John Rice Bradlee.

KING & KING,
Attorneys of Record.

GEORGE A. KING,
Of Counsel.

Filed October 31, 1910.
Allowed by the Court, November 14, 1910.

18 VIII. *Order for Re-entry of Judgment.*

The motion of the claimants for re-entry of judgment was allowed, the judgment entered October 24, 1910 set aside and a new judgment is now entered nunc pro tunc as of October 24, 1910, as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge and decree that the petition of the said Charles Dummer Barry, Frederick Walker Lincoln, and John Rice Bradlee, surviving partners of Henry W. Peabody & Company, be, and the same is hereby, dismissed.

BY THE COURT.

19 IX. *Application for and Allowance of Appeal.*

Now come the claimants, Charles Dummer Barry, Frederick Walker Lincoln and John Rice Bradlee, surviving partners of the firm of Henry W. Peabody & Company, by their attorneys of record, King & King, and hereby make application for, and give notice of, an appeal to the Supreme Court of the United States from the judgment of this court rendered on the 24th day of October, 1910, dismissing the petition.

KING & KING,
Attorneys of Record.

GEORGE A. KING,
Of Counsel.

Filed and Allowed in Open Court November 14, 1910.

20 In the Court of Claims.

HENRY WAYLAND PEABODY, CHARLES DUMMER BARRY, FREDERICK WALKER LINCOLN and JOHN RICE BRADLEE, Comprising the Firm of Henry W. Peabody & Company,

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, and opinion of the Court, of the judgment of the Court dismissing the petition, and of the suggestion of death and re-entry of judgment thereunder, and application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 16th day of November, 1910.

[Seal Court of Claims. Reipublicæ Civibusque.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 22406. Court of Claims. Term No. 170. Charles Dummer Barry, Frederick Walker Lincoln and John Rice Bradlee, surviving partners of Henry W. Peabody & Company, Appellants, vs. The United States. Filed November 16, 1910. File No. 22406.

25

Supreme Court of the United States.

October Term, 1870.

No. 75.

CHARLES DOMINICK BARRY, FREDERICK WALKER LINCOLN and JOHN RICE BEARLEY, Surviving Partners of HENRY W. BEARDSLEY & CO.,

Appellants,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

Brief for Appellants.

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IN THE

Supreme Court of the United States.

October Term, 1912.

CHARLES DUMMER BARRY, FREDERICK WALKER LINCOLN, and JOHN RICE BRADLEE, Surviving Partners of HENRY W. PEABODY & COMPANY, *Appellants*,

v.

THE UNITED STATES.

No. 170.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

I. Statement of the Case.

Henry W. Peabody & Co. of New York entered into a contract July 1, 1904, with the Quartermaster's Department of the Army, for the sale and delivery during the fiscal year beginning on that day of 70,000 tons "of coal known as 'Wallsend,' of good quality, for steaming purposes," etc., at Manila and other ports in the Philippine Islands, not to exceed 8,000 tons a month, and at such times as might be required by the United States, and subject to forty-two days written notice when the delivery was to be at ports outside of Manila Bay. Deliveries in Manila Bay were to be in two ship loads, one to arrive between the 1st and 15th of each month, and the other between the 15th and last day of the month (Finding I; contract, Arts. 1–3, record, pp. 4, 5).

The contract required (Art. 6, p, 5):

"That the said parties of the second part shall file with the officer in charge of water transportation an official report of tests, showing the quality of the coal intended to be delivered and a sufficient sample for test, and if at any time the coal offered under this contract shall fall below the report so filed or the quality of the sample submitted, then such coal will be rejected."

The price was to be $5.15 a ton (Art. 11, record, p. 6).

In case of the failure of the contractors to deliver the Government was to have power to purchase at the lowest price obtainable, either in open market, or by special contract, such quantity of coal of equal grade as might be required, the difference in cost to be charged to the contractors (Art. 12, record, p. 6).

The remainder of the findings are as follows (record, pp. 7, 8):

"II. Deliveries were begun under this contract in August, 1904, and averaged about one delivery a month, and were made at the times and places and to the amounts requested by the officers of the Quartermaster's Department, who did not require or wish the full amount specified in the contract to be delivered and who also did not give and were not required to give the amount of notice specified in paragraph 2 of the contract for deliveries at ports outside of Manila Bay.

"In the month of January, 1905, a strike took place at the Newcastle collieries in Australia, the source of supply of the coal known as Wallsend, specified in the contract, whereby the claimants became temporarily unable to supply that kind of coal. Being informed of this fact by cablegram dated January 21, 1905, and received at Manila on the same day, the agent of the claimants conveyed immediate notice thereof to Col. John L. Clem, Assistant Quartermaster-General, United States Army, chief quartermaster of the Division of the Philippines at Manila, informing him at the same time that, as also stated in the same cablegram, an equal quantity of

good Australian coal, known as mountain coal, could be supplied. It was stated in the conversation with Colonel Clem that this mountain coal was not fully equal to Wallsend, but that it was believed to be a good coal. Colonel Clem agreed to accept said mountain coal. It was then and there stated between said agent of the claimants and said Colonel Clem that the price to be paid for the 6,000 tons of mountain coal then required by the Government should be $5.15 a ton, the same price as specified in the contract for Wallsend coal, and agreed that the same should be considered as a purchase outside of the contract to meet existing conditions. The agent of the claimants thereupon cabled to their office at Sydney, New South Wales, Australia, ordering the 6,000 tons of mountain coal, and the same was delivered by the claimants, accepted by the Government, and paid for on a voucher of the disbursing quartermaster at Manila at the rate of $5.15 a ton.

"III. On the 3d of February, 1905, after the shipment, but before the delivery of said mountain coal, the claimants addressed a letter to Colonel Clem asking to be furnished with an order for said coal as a purchase in accordance with the agreement and conversation referred to in the preceding finding. Colonel Clem thereupon informed the claimants, through the officer in charge of water transportation, that a sample of the mountain coal would be shipped to the Quartermaster-General for test, and in case of its falling below the Wallsend coal, that difference would be charged against the claimants under the contract. The claimants, by letter of February 18, 1905, protested against this qualification, insisting that the agreement orally made with Colonel Clem was to accept mountain coal at the same price as that specified in the contract for Wallsend coal, without reserve as to quality. The mountain coal was inferior to Wallsend coal, but its market value at Manila at that time, owing in part to said strike, was $5.15 a ton, the price orally agreed upon and paid to the claimants.

"IV. A sample taken from the cargo of mountain coal above mentioned was sent to the Quartermaster-General

at Washington, and on being subjected to test was found to be of less value than the Wallsend coal, as provided by the contract, the pro rata reduction in price of the cargo being found to be $3,193.32, or of the value of $4.63 a ton instead of $5.15.

"Thereafter claimant entered into a second contract with the chief quartermaster of the Division of the Philippines to deliver 60,000 tons of West Wallsend coal for the fiscal year beginning July 1, 1905. In the month of April, 1906, the quartermaster deducted from the price of a cargo of coal delivered under said contract the sum of $3,193.32 due the United States, the difference in value between the Wallsend coal as provided by the contract and the mountain coal delivered by the claimant."

The Court of Claims in an opinion by Mr. Chief Justice Peelle, held that the deduction of $3,193.32 from the price of the coal delivered under the second contract to make up the supposed deficiency of quality in the coal delivered under the first contract was rightfully made and refused to award the amount to the claimants. The case is reported 45 C. Cls. 532. The petition was therefore dismissed and the claimants appealed.

II. Assignment of Error.

The appellants hereby assign as error in the opinion and judgment of said Court of Claims that said court refused to award to the appellants the amount of the deduction of $3,193.32, deducted from the amount of their second contract, and gave a judgment dismissing their petition.

Whereas, said court should have decided that said deduction of $3,193.32 was unwarranted and improperly made, and should have given judgment in favor of appellants for that amount.

III. Brief of Argument.

The Issue.

The contract provided but one price for the coal to be delivered under it, $5.15 a ton (par. 11, record, p. 6). It also provided (par. 6, p. 5) that if the coal offered under this contract should fall below the official report of tests or the quality of the sample submitted, it should be rejected. It also provided (par. 12, record, p. 6) that in case of failure of the contractors to comply with the contract, the Government might purchase such quantity of coal of equal grade as might be required, and charge the difference in cost to the contractors.

There was no provision in the contract for an abatement or reduction of the price under any circumstances. The failure to deliver coal of the exact quality specified in the contract was due to a strike at the collieries in Australia, causing the claimants to be temporarily unable to supply that coal.

The facts were fully and fairly put before the Chief Quartermaster of the Division of the Philippines, the highest officer of the Quartermaster's Department in the Philippine Islands. He agreed unqualifiedly to accept the coal named by the agent of the claimants and to pay for the same at the same price specified in the written contract. The price was not excessive. The finding is (Finding III at end, record, p. 8):

"The mountain coal was inferior to Wallsend coal, but its market value at Manila at that time, owing in part to said strike, was $5.15 a ton, the price orally agreed upon and paid to the claimants."

The coal was ordered by the claimants from the Australian mines and was shipped on the faith of the oral agreement to pay that price for it. Not until after the shipment was made were the claimants informed that if

the quality of the coal was found to fall below that of Wallsend coal specified in the contract, the difference would be charged against them. When they were so informed, they protested against such qualification, and insisted upon the oral agreement with the Chief Quartermaster for the payment of the contract price for this lot of coal. The coal was paid for on a voucher of the Disbursing Quartermaster at Manila at the rate of $5.15 a ton, the rate specified both in the written contract, and in the oral agreement.

Not until more than a year later, in April, 1906, was the propriety of this transaction questioned, and the sum in controversy deducted from the amount due under a subsequent contract for a similar amount of coal for the following fiscal year.

The case is put for the appellant on the following grounds:

I. In the conversation between the agent of the claimants and Colonel Clem, Chief Quartermaster of the Division of the Philippines, in which it was stated that the price to be paid for this lot of coal should be $5.15 a ton, it was "agreed that the same should be considered as a purchase outside of the contract to meet existing conditions" (Finding II, record, p. 8).

If the transaction is to be regarded as a purchase in the open market in accordance with the contemporary understanding of the parties, it is certain that no portion of the price can be recovered back. The goods were delivered and the price paid. That price was only the fair market price as found at the end of Finding III, p. 8. The transaction was therefore closed and settled. It can not be reopened at the will of one of the parties to the prejudice of the other.

II. If, on the other hand, the delivery is regarded as

made under the written contract, the payment was in strict accordance with that contract, even though the coal as delivered varied slightly from the quality specified in the contract. A slight variation from the specified quality of the goods called for by the contract was within the lawful discretion of the receiving officer, and does not warrant any abatement of price, especially in view of the finding, end of Finding III, p. 8, that the amount of the contract price as paid was no more the market value.

III. In either case the transaction having been closed by payment of the price stipulated both in the written contract and in the oral agreement, which was also the fair market price for the coal, was not subject to be subsequently reopened.

An Open Market Purchase.

The arrangement orally made between the representative of the claimants and the Chief Quartermaster of the Division of the Philippines was for the delivery of 6,000 tons of mountain coal at $5.15 a ton, and "that the same should be considered as a purchase outside of the contract to meet existing conditions." The price orally agreed upon, $5.15 a ton, was the same as that named in the contract with the claimants, and was the market value of the coal delivered in Manila at that time. The coal was accepted and paid for at the rate named in the oral agreement.

These facts bring the case within the decision of this court in *Clark* v. *United States*, 95 U. S. 539, where the court said (p. 542):

"We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*."

And again (p. 543):

"This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other."

A much weaker case was decided in favor of the contractors by the Comptroller in 1908, 15 Comp. Dec. 65. Here an offer was made by contractors in a foreign port to furnish coal to vessels of the United States at a certain price. On the faith of this offer being regarded as governing the price the contractors furnished the coal without entering into a formal contract such as is required by Revised Statutes, section 3744. The Comptroller decided as follows, pp. 67, 68:

"From the foregoing statement of facts it is apparent that notwithstanding the fact that the contract for the coal in question was not executed in accordance with the provisions of section 3744, Revised Statutes, yet it having been fully executed by both of the parties thereto, without default, with the exception that the Government has not paid the full contract price for the coal so delivered, and accepted by it, and the contractors not having waived the contract price, but having accepted the sum of $8.58 per ton and reserved their rights as to the balance, it is quite clear that under the doctrine laid down in the cases of *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159, and *United States* v. *Andrews & Co.* 207 U. S. 229, the said contractors are entitled under such circumstances to be paid the full amount which they contracted to receive for the coal so delivered and accepted."

In a still later decision, dated February 15, 1909, the Comptroller says, 15 Comp. Dec. 499:

"Without entering into a discussion of the requirements of section 3744, Revised Statutes, and its bearing

upon this contract, it is sufficient to say that the contract has been executed on the part of the contractor and accepted by the officers of the Government. It therefore becomes a binding contract, although not reduced to writing and signed by the contracting parties; and the contractor is entitled to be paid the full contract price in the absence of any intervening circumstances which might operate to reduce the amount of the payment (15 Comp. Dec. 65; *United States* v. *Andrews & Co.* 207 U. S. 209).

Acceptance and Payment Regular.

But, if the delivery and acceptance of this coal be regarded as taking place under the contract, then also it was regular and lawful.

It seldom happens that every minute provision of a contract of this character requiring inspection of goods and ascertainment of a standard is followed out to the letter. Something must always be left to the discretion of the officer having authority to test and receive the goods.

In *District of Columbia* v. *Gallaher*, 124 U. S. 505, a contract was made with the District of Columbia for the construction of a sewer. In the actual work of construction there were a number of departures from the letter of the specifications. These departures were made under the authority of the engineer officer of the Army acting on behalf of the District. The engineer stated (middle p. 509) "that he should make a deduction in price, but named no sum." A deduction was made accordingly, and suit was brought to recover the amount thereof. The court in the opinion by Mr. Justice Matthews said (p. 510):

"The whole controversy * * * arises out of the fact that the letter of the contract and specifications does not correspond with the plan of the work as furnished by the District engineer and the sample of the work which

had been done previously by other contractors, and with which that of the present claimants was to connect. The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

The present case is analogous. The substitution of mountain coal for Wallsend was made as much for the convenience and advantage of the Government as for that of the claimants. The action was taken by the officer on the spot, who was more familiar with the necessities and requirements of the service than any one else could possibly be.

As this court said in *United States* v. *Shrewsbury*, 23 Wall. 508, 517:

"If there was any failure by the contractor, the time and place of delivery were the time and place to ascertain the facts, and to put the evidence in an effectual shape."

In *Salomon* v. *United States*, 19 Wall. 17, this court recognized the authority of a receiving officer to accept goods under circumstances varying to some degree from the literal requirements of the contract. There a contract was made for a quantity of corn to be delivered by the first of May, 1865. Some was delivered within the specified time and some not until October 15, 1865. The court said by Mr. Justice Miller (pp. 19, 20):

"Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction

in which the government received and took possession of the corn, and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

"The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.

"And if this were not so, when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

In *Finucane* v. *Board of Education*, 190 N. Y. 76, the Court of Appeals of New York decided that where a builder, with the consent of the owner, departs from the specifications in getting his brick made in a cheaper manner, there can be no reduction of the contract price.

In *Brabazon* v. *Seymour*, 42 Conn. 551, on a building contract calling for a certain kind of stone, the builder, with the consent of the owner, delivered another kind of stone of less cost, the owner not asking at the time for any allowance in his favor on account of the substitution. It was held that the builder was under no legal obligation to make any allowance or abatement of price to the owner.

So in *Talbot Paving Company* v. *Gorman*, 105 Mich. 403; 27 L. R. A. 96, 97, the court said:

"If the sale is without a warranty, and affords an opportunity for ascertaining whether the goods conform to the description, the doctrine of *caveat emptor* applies, and an acceptance cuts off all right of recovery. The vendee

should decline to receive the goods, and sue for a breach of the contract."

In *Kingsley* v. *Brooklyn*, 78 N. Y. 200, certain piles which were by the contract to be driven 24 feet, were by direction of the engineer representing the owner of the building driven only 16 feet. It was held that there could be no deduction of price on that account. The court said (p. 212):

"The defendant had a right to demand the very work specified, and if it accepted anything less as sufficient for the purpose named, has no right to insist that a rebatement should be made for that reason."

In *Sirch Electrical Laboratories* v. *Garbutt*, 13 Cal. App. 435, it was held that one accepting and paying for goods delivered under a contract with full knowledge that they are not up to the contract standard, thereby waives any right to seek damages therefor. The court said (p. 439):

"The defendant, with full knowledge of all the defects in the work, accepted and paid for it, and he thereby waived his claim for damages. This is not a case in which judgment has been given on a *quantum valebat* or *quantum meruit* count, but one in which the court has found that goods and labor to a certain value have been furnished under the contract and so accepted by it, notwithstanding they were not up to the standard fixed by the contract."

In *Merriam* v. *United States*, 20 C. Cls. 290, where a contractor sued for the balance of the contract price for cattle delivered under a contract, though slightly below the weight specified in the contract, the Court of Claims held that the cattle having been accepted by the proper officers of the Government, the contract price must be paid, and said (p. 297):

"After thus leading the claimant to understand that he had complied with all the terms and requirements of his contract, the defendants could not afterwards legally claim a reduction in price for underweight when it was too late for him to remedy the matter, even if he would have been obliged to do so at the time of delivery."

In *National Contracting Company* v. *Sewerage and Water Board*, 141 Fed. Rep. 325, it was held that if a building contractor in carrying out a contract, used cement of a cheaper quality than that specified in the written contract, the owner of the work could not, after accepting and paying for the work, recover back any portion of the price paid.

Transaction Closed by Payment.

But outside of any question on the original merits of the transaction, the purchase of the coal was closed by the payment made for it at the time.

It so happened that the same contractors entered into a subsequent contract with the United States for a supply of coal for the ensuing fiscal year.

More than a year after this coal had been delivered and paid for, $3,193.32 was deducted from the contract price of coal delivered under the subsequent contract on the ground that a test of the coal involved in the present case showed that it fell below the specification requirements of the contract. This the officers of the Government had no right to do.

This case presents the converse of that which was before this court in *St. Louis Hay and Grain Company* v. *United States*, 191 U. S. 159. There the claimant delivered hay under an agreement void under Revised Statutes, Sec. 3744, on account of not having been duly signed by both parties with their names at the end thereof. The period of deliveries was unreasonably prolonged through the acts

of the officers of the Government, and meanwhile, the market value of hay rose enormously. The claimant received the price named in the informal agreement, which was far below the actual value at the time of the delivery, and sued for the difference. It was held, however, that the transaction having been consummated by payment in accordance with the informal agreement, could not be reopened and a higher price demanded by the contractor. The court in the opinion by Mr. Justice Holmes says (p. 163):

"The invalidity of the contract is immaterial after it has been performed. When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid while executory; the transfer can not be revoked or the terms changed. A promise to make a gift does not bind, but a gift can not be taken back, and a transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange. The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods."

The same reasoning fits the present case. Whether the delivery was by virtue of the contract or was an open market purchase, the payment was made. Indeed, in one respect, the ground for holding the transaction consummated and closed is much stronger here than it was there. There the party received much less than the real value of the goods. Here the amount paid was the exact market value of the goods. The parties in this case respectively paid their money and delivered their goods on terms not only mutually satisfactory at the time, but also entirely equitable. The Government ought not to be permitted to reopen a transaction settled and consummated not only without fraud, but in accordance with the full understanding of both parties at the time.

Conclusion.

It is submitted, therefore, that the judgment of the Court of Claims should be reversed and the cause remanded with directions to enter judgment in favor of the appellant for $3,193.32.

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Attorneys for Appellants.

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JAMES H. McKENNEY
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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 170.

CHARLES DUNNER BARRY, FREDERICK WALKER LINCOLN and JOHN RICE HEADLEE, Surviving Partners of HENRY W. PEABODY & COMPANY, Appellants,

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Supreme Court of the United States.

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v.

THE UNITED STATES.

No. 170.

BRIEF FOR APPELLANTS IN REPLY.

As it is argued in the brief for the United States (pp. 11, 12) that the oral agreement between the parties was not binding upon the United States as a contract, it is deemed best here to cite the statutes and regulations governing open-market purchases.

The Statutes.

The act in force governing open-market purchases at this time was a provision of the act of April 23, 1904 (33 Stat. L. 268, 269), providing as follows:

"That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; but every open market emergency purchase made in the manner common among

business men which exceeds in amount two hundred dollars shall be reported for approval to the Secretary of War under such regulations as he may prescribe."

This act took the place of Sec. 3709 of the Revised Statutes, as well as of several intervening statutes, all enumerated in a note to the official publication entitled, "The Military Laws of the United States," Sec. 1543.

Regulations.

The following were the Regulations of the Army in force at the time, touching contracts, oral agreements, and open-market purchases. They are taken from the "Regulations for the Army of the United States, 1904":

"548. A purchase of supplies or engagement of services will be made:

"1. By contract, 'reduced to writing and signed by the contracting parties with their names at the end thereof.' Agreements of this character only are termed 'contracts' in these regulations. This method will, subject to such exceptions as may be authorized by regulations of particular staff departments, be used when delivery or performance does not immediately follow an award or bargain.

"2. By written proposal and written acceptance. This method may be resorted to when delivery or performance immediately follows award or bargain or when specifically authorized by the regulations of the staff department concerned.

"3. By oral agreement. This method may be used under circumstances indicated in paragraph 549, if delivery or performance immediately follows the agreement.

"549. An open-market purchase of supplies or engagement of services is one made without advertising, and is authorized in the following cases:

"1. In an emergency, as when the public exigencies require immediate delivery or performance and there is no time to advertise by newspapers, posters or circulars.

"2. When it is impracticable to secure competition.

"3. When proposals have been invited and none have been received.

"4. When proposals are above the market price or otherwise unreasonable.

"550. Before making a purchase in open market the officer will inform himself concerning prevailing prices by inquiry among principal dealers in his locality.

"551. Open purchases for the military service on or near an Indian reservation will be made as far as practicable from the Indians, under the conditions set forth in paragraph 477, when fair and reasonable rates, not exceeding the market prices in the locality, can be obtained.

"552. An officer of any department who makes an open-market emergency purchase (paragraph 549, 1) exceeding $200 in amount will transmit with his monthly money accounts a report setting forth the number of the voucher, the date and place of purchase, name of seller, the kind and total money value of supplies so purchased, and the reasons for the mode adopted in each case. The head of the bureau will submit these reports to the Secretary of War."

Decisions.

Construing these provisions relative to open-market purchases, the Comptroller of the Treasury has ruled (quoting the syllabus of his decision, 5 Comp. Dec. 259):

"The provision in the act of July 5, 1884, that purchases of supplies for the Quartermaster's and Commissary Departments in cases of emergency 'must be at once reported to the Secretary of War for his approval' is directory only, and the failure of certain officers of these Departments to make reports of such purchases does not invalidate the purchases or the payments therefor."

This court decided in regard to a similar provision in force during the Civil War:

"But that statute, while requiring such advertisement

as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance.

"It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract can not be made to depend on the degree of wisdom or skill which may have accompanied its exercise." (*United States* v. *Speed*, 8 Wall. 77, 83.)

Conclusion.

If the transaction is treated as the parties treated it at the time, as an open-market purchase outside of the contract, it is clear the Government sustained no damage. If the officer had upon the failure of the appellants to deliver satisfactory coal proceeded in compliance with Art. 12 of the contract (record, p. 6) to purchase coal in the open market from some one else, the best coal he could have obtained would undoubtedly have been this very kind of coal—mountain coal.

He would have had to pay $5.15 a ton for it, that being the market price (end of Finding III, record, p. 8). As this was the exact price named in the contract, there would have been no "difference in cost" to charge to these appellants. The fact that he bought it from these contractors and appellants, gives the Government no greater right to charge them with damages than if it had been purchased from some one else.

The learned court below in its opinion (record, pp. 10, 11) while apparently conceding that as between private parties the acceptance of and payment for this coal, even though slightly below the contract standard, would have been final, distinguished the case in the fact that the

contract was with the Government. This distinction is not maintainable.

The Court of Claims in *Lyons* v. *United States*, 30 C. Cls. 352, 360, 361, quoting a great authority, says:

"The law, as we understand it, was stated by Hamilton in these words: 'When a Government enters into a contract with an individual it deposes, as to the matter of the contract, its constitutional authority and exchanges the character of a legislator for that of a moral agent with the same rights and obligations as an individual.' (3 Hamilton's Works, p. 518.)

"The general principle there stated was adhered to in the case of the *United States* v. *Bank of the Metropolis* (15 Peters, 377–392), where the Postmaster-General had accepted a draft, and the court say, 'When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States can not be sued.'"

In *United States* v. *State Bank*, 96 U. S. 30, 36, this court says:

"The United States must use due diligence to charge the indorsers of a bill of exchange, and they are liable to damages if they allow one which they have accepted to go to protest. *United States* v. *Barker*, 12 Wheat. 560; *Bank of the United States* v. *The United States*, 2 How. 711; *The United States* v. *Bank of the Metropolis*, 15 Pet. 377.

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved."

It was therefore the duty of the Government as it would have been that of a private party if it did not

desire the cargo of coal, promptly to exercise its option. It might have notified the contractors beforehand that they must furnish coal of the full contract standard, and then if inferior coal were tendered might have rejected the same upon the attempt to deliver. It did neither.

It invited the contractors to deliver coal with full knowledge that it was slightly below the contract standard though the best obtainable. Upon delivery it paid for the same in full. No attempt was made to question or recall that payment until all transactions under the contract had been closed up and more than a year had elapsed from the date of the payment. Such conduct in a private party would effectually estop him from ever afterwards contesting the validity of the payment so made. It must equally conclude the Government.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

CHARLES DUMMER BARRY, FREDERICK WALKER LINCOLN, and JOHN RICE BRADLEE, surviving partners of HENRY W. PEABODY & Co., v. THE UNITED STATES. } No. 170.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the surviving partners of the firm of Henry W. Peabody & Co. from a judgment of the Court of Claims dismissing their petition in a suit brought to recover an alleged balance of $3,193.32 on a contract for coal furnished the Quartermaster Department, U. S. Army, at Manila, Philippine Islands, during the year 1905.

The following are the material facts upon which the claim arises:

Under date of July 1, 1904, Peabody & Co. entered into a written contract with Col. John L. Clem, chief quartermaster, United States Army, at Manila, to

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furnish and deliver during the ensuing fiscal year, ending June 30, 1905, 70,000 tons of a certain Australian coal of specified quality, known as "Wallsend," in deliveries not exceeding 8,000 tons per month, ex ship, Manila Bay, and at certain other points in the Philippine Islands, at $5.15 per ton; all deliveries to be subject to careful inspection under instruction of the chief quartermaster, and quantity to be determined by weight.

Certain causes excusing delay in the movement and discharge of the vessels were named in the contract, but no provision was therein made for exempting the contractors from their obligation to furnish the coal as required due to strikes or any other cause.

The contract further provided:

> VI. That the said parties of the second part shall file with the officer in charge of water transportation an official report of tests, showing the quality of the coal intended to be delivered and a sufficient sample for test, and if at any time the coal offered under this contract shall fall below the report so filed or the quality of the sample submitted, then such coal will be rejected.
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> * * * * *
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> IX. That payment for coal delivered under this contract shall be made as early as practicable after the discharge of each and every vessel at Manila or outports.
>
> X. That deliveries on this contract shall, if required, commence on the fifteenth day of August, nineteen hundred and four, provided

that the agreement is approved by the proper authorities of the War Department; otherwise, not until such approval is obtained.

* * * * *

XII. That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof then the party of the first part shall have the power to purchase in open market at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, the difference in cost to be charged to and paid by the said parties of the second part, or their sureties.

* * * * *

This contract shall be subject to approval of the commanding general, Philippine Division, U. S. A.

The commanding general, having duly approved the contract, deliveries were begun thereunder in August, 1904, and continued at the times and places and in the quantities requested by the officers of the Quartermaster's Department until January, 1905, when, owing to a strike in the Australian collieries, from which the supply of Wallsend coal was obtained, the claimants became temporarily unable to furnish that kind of coal.

The agent of the claimants, at Manila, being informed of this fact by cable, conveyed immediate notice thereof to Colonel Clem, the chief quartermaster, with whom the contract was made, informing

Clem at the same time, as found by the court below, that—

> as also stated in the same cablegram, an equal quantity of good Australian coal, known as mountain coal, could be supplied. It was stated in the conversation with Colonel Clem that this mountain coal was not fully equal to Wallsend, but that it was believed to be a good coal. Colonel Clem agreed to accept said mountain coal. It was then and there stated between said agent of the claimants and said Colonel Clem that the price to be paid for the 6,000 tons of mountain coal then required by the Government should be $5.15 a ton, the same price as specified in the contract for Wallsend coal, and agreed that the same should be considered as a purchase outside of the contract to meet existing conditions. The agent of the claimants thereupon cabled to their office at Sydney, New South Wales, Australia, ordering the 6,000 tons of mountain coal, and the same was delivered by the claimants, accepted by the Government, and paid for on a voucher of the disbursing quartermaster at Manila at the rate of $5.15 a ton. (Finding II, Rec., p. 8.)

By a further finding of the court below it also appears that mountain coal was inferior to Wallsend coal, but that its market value at Manila at that time, owing in part to the existing strike, was the price oraliy agreed upon, to wit, $5.15 per ton.

After the shipment of the Mountain coal from Australia, but before its arrival at Manila, the

claimants addressed a letter to Col. Clem asking to be furnished with an order for the Mountain coal in accordance with the oral agreement and conversation above narrated. Clem thereupon informed the claimants that a sample of the Mountain coal would be shipped to the Quartermaster General for test, and in case of its falling below the Wallsend coal that the difference would be charged against the claimants under the contract, to which the claimants protested in writing as not being in accordance with their oral agreement.

A sample taken from the cargo of Mountain coal was accordingly sent to the Quartermaster General at Washington (the cargo in the meantime having been accepted and paid for at the rate of $5.15 per ton by the disbursing quartermaster at Manila), which, upon being tested, was found to be of the value of $4.63 per ton, as compared with Wallsend coal, or $3,193.32 less than for the same tonnage of Wallsend coal.

Thereafter the claimants entered into a second contract with the chief quartermaster of the Philippines Division to deliver 60,000 tons of West Wallsend coal for the succeeding fiscal year ending June 30, 1906, and in April of that year the quartermaster deducted from the amount then due the claimants for coal delivered under such second contract the sum of $3,193.32, being the difference ascertained, as before stated, in value between the Wallsend and the Mountain coal delivered under the first contract, whereupon the claimants brought this action.

The Court of Claims declined, in view of the provisions of the written contract and the legal limitations upon the chief quartermaster as agent of the Government, of which the claimants were bound to take notice, to accept the oral agreement as modifying the written contract or as definitely fixing the price of the Mountain coal, which at the time was known by both parties to be inferior to Wallsend coal, and held that the deduction from the price of coal delivered under the second contract was a proper subject of set-off against any claim in favor of the claimant company.

Judgment was accordingly entered for the United States and the petition ordered dismissed, from which order the claimants appealed.

ARGUMENT.

I.

The appellants having bound themselves by the terms of the written contract to deliver a certain quantity of Wallsend coal of an ascertained quality during the fiscal year 1905, the chief quartermaster as agent of the Government was without authority to modify that requirement except as specifically provided in the contract.

The position of the appellants in this court, as in the court below, depends upon the proposition that whether the cargo of Mountain coal be regarded as a purchase in the open market or as a delivery under the written contract, the appellants are equally entitled to recovery because of the oral understanding with the chief quartermaster and his subsequent

acceptance of and payment for the coal at the price orally agreed upon.

In other words, they contend that the chief quartermaster had authority to release the claimants by oral agreement from the obligation of their written contract and to permit them to substitute at the same price a coal of admittedly inferior grade for that named in the written contract.

Such a position is clearly untenable upon the familiar principle that an executive officer of the Government is without authority to exempt or excuse a contractor from the due performance of his contract except in the manner and for the causes therein specifically provided.

As this court declared in *Hawkins* v. *United States* (96 U. S., 691)—

> Individuals as well as courts must take notice of the extent of the authority conferred by law upon a person acting in an official capacity and the rule applies in such case that ignorance of law furnishes no excuse for any mistake or wrongful act. (*State, ex rel. &c.* v. *Hayes*, 52 Mo., 578; *Delafield* v. *The State of Illinois*, 26 Wend. (N. Y.), 91; *The People* v. *The Phoenix Bank*, 24 id., 430; *The Mayor and City Council of Baltimore* v. *Reynolds*, 20 Md., 1; *Whiteside* v. *United States*, 93 U. S., 247.)

And especially does this rule apply where the contract, as in the case at bar, was in terms made subject to the approval of a designated officer superior to the chief quartermaster, to wit, the commanding general, Division of the Philippines, U. S. Army.

Furthermore, it should be observed there is nothing in the finding relating to the oral agreement by which the fact is affirmatively established that the chief quartermaster actually attempted or intended to modify in any particular appellants' obligation under the written contract. (Findings II and III, Rec., pp. 7 and 8.) On the contrary, the facts as there found are entirely consistent with and fully support the contention that the agreement of the chief quartermaster to accept the Mountain coal was made subject to the provisions of Article XII of the written contract, in order to meet appellants' failure to comply with the stipulation of that contract according to its true intent and meaning.

Appellants' obligation under the written contract.

The appellants' obligation under the written contract was clear and explicit. It was to furnish and deliver during the fiscal year 1905 certain quantities of Wallsend coal of ascertained quality, with no exemption provided for failure to perform that obligation due to strikes or any other cause. Hence, to quote the language of the opinion of the court below:

> They were equally bound to deliver the coal contracted for after as well as before the strike; and when, for their accommodation and convenience, the quartermaster agreed to accept a different and inferior quality of coal at the contract rate, though nothing was said at the time about a sample being sent to the Quartermaster General for test, still the oral contract, if contract it was, must be construed with

reference to the terms of the written contract, Article XII of which provides:

"XII. That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof, then the party of the first part shall have the power to purchase in open market at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, *the difference in cost to be charged to and paid by the said parties of the second part, or their sureties.*" [Our italics.]

* * * * *

In view of the provisions of the contract and the legal limitations upon the quartermaster as the agent of the Government, of which the claimants were bound to take notice, we can not accept the oral agreement as modifying the written contract or definitely fixing the price of the mountain coal when it was at the time known to both parties to be inferior to the Wallsend coal. On the contrary, the oral agreement, whether the mountain coal was to be accepted under the contract or as an outside purchase, was subject to the provisions of the contract between the same parties. The amount of the deduction was ascertained as provided by the contract and, under the law, was a proper subject of set-off against any claim in favor of the claimant.

(Rec., pp. 10 and 11.)

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Authorities cited for appellants not applicable.

A number of cases are cited in support of appellants' argument upon this branch of the case, none of which, however, appear to us applicable to the facts here involved.

For example, the case of *District of Columbia* v. *Gallaher* (124 U. S., 505), as shown by the excerpt quoted from the opinion (appellants' brief, pp. 9 and 10), arose out of the fact that the letter of the contract and specifications did not correspond with the plan of the work as furnished by the engineer for the District, and the sample of the work exhibited to bidders, previously done by other contractors and with which that of the subsequent contractor was to connect. The work under the second contract having been done under the direction and supervision of the District engineer in accordance with the plan and sample was supposed and understood by him and the contractor to be what was required by the contract, it was held that this mutual understanding amounted to a practical construction of the terms of the contract by the parties themselves, and should prevail over its literal meaning. Here, however, as declared by the court below, "there was no conflict in the provisions of the contract requiring modification, nor did the quartermaster in charge require the claimants to do or perform any act outside the terms of the contract, nor was it in any way the fault of the United States or any of its officers that claimants were unable to perform their contract in delivering Wallsend coal." (Rec., middle page, 10.)

In the second case, *Salomon* v. *United States* (19 Wall., 17), cited by appellants, there was no attempt made to substitute an inferior article for that required by the contract. The question there decided was merely that an act requiring contracts for military supplies to be in writing was not infringed by the proper officer having charge of such matters accepting delivery of such supplies after the day stipulated, and, therefore, that a verbal agreement to extend the time of performance was not invalid.

The other cases cited by appellants' counsel (brief, pp. 11–13) relate to controversies between private litigants, as to which a wholly different rule prevails from that in suits to which the United States is a party.

Hawkins v. *United States* (96 U. S., 691) and authorities there cited.

II.

The oral agreement between the parties was not binding upon the United States as a contract under section 3744, Revised Statutes.

Irrespective, however, of the question of modification of the written contract or of the legal limitations of the chief quartermaster, the oral agreement, even if construed in the manner for which appellants contend, was not binding upon the United States because not "reduced to writing and signed by the contracting parties with their names at the end thereof," as required by section 3744, Revised Statutes, which section is in the nature of a statute of frauds.

Clark v. *United States* (95 U. S., 539); *South Boston Iron Co.* v. *United States* (118 U. S., 37); *Monroe* v. *United States* (184 U. S., 524); *St. Louis Hay Company* v. *United States* (191 U. S., 163).

It was therefore entirely competent for the chief quartermaster to impose the condition, even after the Mountain coal had been shipped from Australia but before it was delivered at Manila, that such coal should be subjected to an official test and the difference, if any, between it and Wallsend coal charged against the appellants. And the subsequent delivery of the coal by the appellants after receipt of such notice must be held to have been made subject to the condition thus imposed, appellants' protest to the contrary notwithstanding.

Market value of the Mountain coal due in part to existence of strike.

It is insisted in appellants' behalf, however, that if the transaction be regarded as a purchase outside the contract, it is certain no part of the price can be recovered back upon the theory apparently that the coal having been delivered, accepted, and used by the Government the appellants are entitled upon *quantum meruit* to its fair market value, which the court has found was, at Manila at that time, the rate orally agreed upon, which was also the rate named in the written contract, to wit, $5.15 a ton.

The difficulty with this contention, however, lies in the fact that it wholly ignores the further finding of the court that such market value at Manila was at

that time owing in part to the existence of the very strike which occasioned the substitution of the Mountain coal (Finding III, Rec., p. 8). To contend under these circumstances, therefore, that the reasonable value of the substituted coal was its then market value at Manila is but to argue that the appellants are entitled to profit by their own default in fulfilling the obligations of their written contract to the extent of the total sum involved in this suit—a contention too obviously unsound for serious discussion.

Moreover, as this court declared in *Hawkins* v. *United States, supra,* at bottom of page 697, also upon appeal from the Court of Claims:

> Implied promises or promises in law exist only when there is no express promise between the parties, *expressum facit cessare tacitum.* Hence, says Chitty, a party can not be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned. (Chitty, Contr. (10th ed.), 62; *Toussaint* v. *Martinnant,* 2 T. R., 100; *Cutter* v. *Powell,* 6 id., 320; *Ferguson* v. *Carrington,* 9 B. & C., 59; *Atherton* v. *Dennett,* Law Rep., 7 Q. B., 327.)

III.

The deduction made by the quartermaster from money due appellants under their second contract for the succeeding fiscal year was authorized upon the principle that parties receiving moneys improperly paid by a public officer are liable *ex æquo et bono* to refund them.

The final objection urged to the judgment below is that even though the amount here in controversy may have been erroneously or improperly paid to appellants in the first instance, yet, nevertheless, payment having been once made, the transaction was thereby closed for all time and the quartermaster was without authority to deduct the sum sued for from money due for coal delivered under appellants' second contract for the succeeding fiscal year.

A similar contention was considered and rejected by this court in the case of *Wisconsin Central Railroad Company* v. *United States* (164 U. S., 190–212). In that case payments had been made to a land-grant railroad company upon accounts certified by the Auditor for the Post Office Department from July 1, 1876, to September 30, 1885, for carrying the mails at the rate allowed to roads not aided by land grants. The law providing that only 80 per cent of such rate should be paid over land-grant roads was considered by the department not to apply to this road, and this construction was followed for more than nine years. This construction of the law was held to be erroneous by a subsequent Postmaster General, who ordered that the excess which had been paid should be de-

ducted from the amount then due the company. The overpayments were deducted by the auditor, and the company brought suit to recover the amounts deducted.

This court said, at page 210:

> As a general rule, and on the grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made. (*Whiteside* v. *United States*, 93 U. S., 247; *Hawkins* v. *United States*, 96 U. S., 689; and cases before cited.) The question is not presented as between the Government and its officer or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of actions not authorized by law, resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.

At page 211, speaking of the Postmaster General, it said:

> If in his judgment money has been paid without authority of law and he has money of the same claimant in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold it

subject to the decision of the court when the claimant sues. (*United States* v. *Carr*, 132 U. S., 644; *Gratiot* v. *United States*, 15 Pet., 336; *Steele* v. *United States*, *United States* v. *Burchard*, *United States* v. *Stahl*, *supra*.) And in that way multiplicity of suits and circuity of action are avoided.

And at page 212 it was further said:

> Reference was made to *Barnes* v. *District of Columbia* (22 C. Cls., 366, 394), wherein it was ruled, Richardson, C. J., delivering the opinion, that "The doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved." We concur in these views, and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them.

In the case of *Logan County* v. *United States* (169 U. S., at page 257) this decision was affirmed in the following language:

> The question of the conclusiveness of the action of the officers of the Government under

their general powers is also referred to in *Wisconsin Central Railroad* v. *United States* (164 U. S., 190), and it is there held that the Government is not bound by the act of its officers in making an unauthorized payment under misconstruction of the law.

See also cases of *United States* v. *Saunders* (79 Fed. Rep., 407–408) and *United States* v. *Utz* (80 Fed. Rep., 852).

If it be objected that a counterclaim or set-off should have been specially pleaded by the Government in this action, attention is further invited to the following language of the *Wisconsin Central Railroad Company case, supra,* at page 212:

> It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand. (United States *v.* Burns, 12 Wall., 246, 254; Clark *v.* United States, 95 U. S., 539, 543; United States *v.* Behan, 110 U. S., 338, 347; United States *v.* Carr, 132 U. S., 644, 650.)

See also *Huse* v. *United States* (222 U. S., 504).

CONCLUSION.

We submit that the judgment of the Court of Claims dismissing the petition in this case was correct and that the judgment should be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney General.
FREDERICK DE C. FAUST,
Attorney.

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BARRY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 170. Argued March 6, 1913.—Decided May 26, 1913.

Where a contractor is unable to make deliveries under a contract with the Government for continuous deliveries of a specified article and agrees with the properly authorized official to meet the emergency by delivering goods of a different class to be paid for according to actual value, the delivery is not one under the contract but is an emergency purchase, nor is an acceptance by the Government an acceptance under the contract; if the goods so delivered are not of the value of the goods contracted for the Government may offset the difference against future deliveries under the contract.

The failure, by reason of a strike, of contractors to deliver coal as required by a contract for continuous delivery for the Philippine Division, creates a condition contemplated by the act of April 23, 1904, providing for open market emergency purchases, and a purchase of coal other than that contracted for so made from the contractor is an emergency purchase and not an outside purchase to meet contractor's default and accepted as fulfilment.

Where a contractor is indebted to the Government under one contract the Government may offset without separate action an amount owing by that contractor under another contract.

45 Ct. Cl. 532, affirmed.

THIS is a petition by appellants, partners under the style of Henry W. Peabody & Company, for a balance alleged to be due on account of coal furnished the Quartermaster's Department, Philippine Division of the Army. So much of the contract, which was in writing and duly signed and approved, as required by § 3744 of Revised Statutes, as is essential to a judgment, may be shortly stated: The contractors agreed to sell and deliver at Manila or certain other designated points, 70,000 tons of coal known as "Wallsend" coal, of good quality "for steaming purposes" at $5.15 per ton, deliveries not to exceed 800 tons per month. The contractors were required

to file an official report of tests showing the quality of coal intended to be delivered and a sufficient sample for test. The sixth provision of the contract was in these words:

"That the said parties of the second part shall file with the officer in charge of water transportation an official report of tests, showing the quality of the coal intended to be delivered and a sufficient sample for test, and if at any time the coal offered under this contract shall fall below the report so filed or the quality of the sample submitted, then such coal will be rejected."

By article 4 of the contract it was agreed, "that all deliveries on this contract shall be subject to careful inspection, under instructions of the Chief Quartermaster, Philippine Division, United States Army," etc. Payment for coal delivered under the contract was to be made on discharge of each cargo.

By article 12 it was agreed:

"That in case of failure of the said parties of the second part to comply with the stipulations of this contract according to the true intent and meaning thereof then the party of the first part shall have the power to purchase in open market at the lowest price obtainable, or by special contract, such quantity of coal of equal grade as may be required, not to exceed the amount herein stated, the difference in cost to be charged to and paid by the said parties of the second part, or their sureties."

The II, III and IV findings of fact are in these words:

II.

"Deliveries were begun under this contract in August, 1904, and averaged about one delivery a month, and were made at the times and places and to the amounts requested by the officers of the Quartermaster's Department, who did not require or wish the full amount specified in the contract to be delivered and who also did not give and were not required to give the amount of notice specified

in paragraph 2 of the contract for deliveries at ports outside of Manila Bay.

"In the month of January, 1905, a strike took place at the Newcastle collieries in Australia, the source of supply of the coal known as Wallsend, specified in the contract, whereby the claimants became temporarily unable to supply that kind of coal. Being informed of this fact by cablegram dated January 21, 1905, and received at Manila on the same day, the agent of the claimants conveyed immediate notice thereof to Col. John L. Clem, Assistant Quartermaster General, United States Army, chief quartermaster of the Division of the Philippines at Manila, informing him at the same time that, as also stated in the same cablegram, an equal quantity of good Australian coal, known as mountain coal, could be supplied. It was stated in the conversation with Colonel Clem that this mountain coal was not fully equal to Wallsend, but that it was believed to be a good coal. Colonel Clem agreed to accept said mountain coal. It was then and there stated between said agent of the claimants and said Colonel Clem that the price to be paid for the 6,000 tons of mountain coal then required by the Government should be $5.15 a ton, the same price as specified in the contract for Wallsend coal, and agreed that the same should be considered as a purchase outside of the contract to meet existing conditions. The agent of the claimants thereupon cabled to their office at Sydney, New South Wales, Australia, ordering the 6,000 tons of mountain coal, and the same was delivered by the claimants, accepted by the Government, and paid for on a voucher of the disbursing quartermaster at Manila at the rate of $5.15 a ton.

III.

"On the 3d of February, 1905, after the shipment, but before the delivery of said mountain coal, the claimants

addressed a letter to Colonel Clem asking to be furnished with an order for said coal as a purchase in accordance with the agreement and conversation referred to in the preceding finding. Colonel Clem thereupon informed the claimants, through the officer in charge of water transportation, that a sample of the mountain coal would be shipped to the Quartermaster-General for test, and in case of its falling below the Wallsend coal, that difference would be charged against the claimants under the contract. The claimants, by letter of February 18, 1905, protested against this qualification, insisting that the agreement orally made with Colonel Clem was to accept mountain coal at the same price as that specified in the contract for Wallsend coal without reserve as to quality. The mountain coal was inferior to Wallsend coal, but its market value at Manila at that time, owing in part to said strike, was $5.15 a ton, the price orally agreed upon and paid to the claimants.

IV.

A sample taken from the cargo of mountain coal above mentioned was sent to the Quartermaster-General at Washington, and on being subjected to test was found to be of less value than the Wallsend coal, as provided by the contract, the pro rata reduction in price of the cargo being found to be $3,193.32, or of the value of $4.63 a ton instead of $5.15.

"Thereafter claimant entered into a second contract with the chief quartermaster of the Division of the Philippines to deliver 60,000 tons of West Wallsend coal for the fiscal year beginning July 1, 1905. In the month of April, 1906, the quartermaster deducted from the price of a cargo of coal delivered under said contract the sum of $3,193.32 due the United States, the difference in value between the Wallsend coal as provided by the contract and the mountain coal delivered by the claimant."

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellants.

Mr. Frederick De C. Faust, with whom *Mr. Assistant Attorney General John Q. Thompson* was on the brief, for the United States.

MR. JUSTICE LURTON, after making the foregoing statement, delivered the opinion of the court.

From the facts it is plain that the contractors could not and did not deliver a cargo of "Wallsend" coal in January, 1905, as their contract obligated them to do. This temporary inability was due to a strike at the colliery. This did not excuse them, since the contract did not so provide. The cargo of mountain coal which was bought to meet the immediate demand, though the same price was paid for it, had a fuel value of $3,193.32 less than that of the same quantity of Wallsend coal, as determined by tests and comparisons with the sample of Wallsend coal, and the question is whether this loss shall be borne by the Government or by the contractor.

Appellants say that if any cargo did not conform to the standard, the only right of the Government was to reject it. But it was not pretended that this cargo was Wallsend coal, or equal to that coal in quality, nor was it accepted as a delivery under the contract. That the Chief Quartermaster agreed to accept it and pay for it the price fixed for Wallsend coal under the contract, and did so accept and pay for it, constitutes the ground upon which the claim of appellants must rest.

The situation was one brought about by the inability of the contractors to carry out their contract. The coal was needed for present necessities. The deficiency in Wallsend coal had to be made up. There was thus presented one of the emergency conditions contemplated by

the law then in force, the act of April 23, 1904, 33 Stat. 268, 269 and the 548th and 549th paragraphs of the Army Regulations of 1904, providing for "open market emergency purchases." Under this condition and under this authority, the Chief Quartermaster agreed to accept a cargo of confessedly inferior coal, and pay the market price for that quality of coal in Manila at the time. That this cargo was not to be accepted as a fulfillment of the contract, and as a waiver of any difference in value between that and Wallsend coal, is demonstrated by the finding that it was agreed "that the same should be considered as a purchase outside of the contract to meet existing conditions." It could not be regarded as an "outside purchase" to meet conditions brought about by the contractors' fault and at the same time be regarded as accepted in fulfillment of the contract.

The finding that the Chief Quartermaster, after the coal had been shipped, but before it arrived or was delivered, gave notice that he would send a sample of the coal to the Quartermaster-General to be tested, and that if it fell below the Wallsend coal, the difference would be charged against the contractors, operated to put them upon guard. They might have refused delivery. They did not, although they protested and asserted views in opposition to that of the officer. The payment made was for that cargo as an "outside purchase," and not a payment under the contract for Wallsend coal. Neither is the agreement to take that cargo, and the payment made for it to be regarded as a waiver of any difference that might exist between the quality and fuel value of the coal so purchased and the coal which should have been supplied. That it does not constitute a waiver, results from the agreement that it should be considered "an outside purchase," and the express notice before delivery that the contractors would be charged with that difference. When that difference was ascertained, it was charged up and

retained from money due under a later contract. The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other.

Judgment affirmed.